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TRANSCRIPT OF PROCEEDINGS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of:

Herring Broadcasting, Inc Wealth TV
v
Time Warner Cable, Inc et al

MB Docket No. 08-214

DATE OF HEARING: November 25, 2008 VOLUME: 2

PLACE OF HEARING: WASHINGTON, D.C. PAGES: 56-161

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:

HERRING BROADCASTING, INC. D/B/A
WEALTHTV,

Complainant, File No.
v. CSR-7709-P

TIME WARNER CABLE INC.
Defendant.

HERRING BROADCASTING, INC. D/B/A
WEALTHTV,

Complainant, File No.
v. CSR-7822-P

BRIGHT HOUSE NETWORKS, LLC,
Defendant.

HERRING BROADCASTING, INC. D/B/A
WEALTHTV,

Complainant, File No.
v. CSR-7829-P

COX COMMUNICATIONS, INC.,
Defendant.

HERRING BROADCASTING, INC. D/B/A
WEALTHTV,

Complainant, File No.
v. CSR-7907-P

COMCAST CORPORATION,
Defendant.

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NFL ENTERPRISES LLC,
Complainant,

v.

File No.
CSR-7876-P

COMCAST CABLE COMMUNICATIONS,
LLC,
Defendant.

TRC SPORTS BROADCASTING
HOLDING, L.L.P., D/B/A MID-ATLANTIC
SPORTS NETWORK,
Complainant,

v.

File No.
CSR-8001-P

COMCAST CORPORATION,
Defendant.

VOLUME 2

Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
Hearing Room TW-A363

Tuesday, November 25, 2008
2:00 p.m.

BEFORE:

RICHARD L. SIPPEL
Chief Administrative Law Judge

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On Behalf of the Federal Communications
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ALSO PRESENT:

KRIS ANNE MONTEITH, FCC, Chief,
Enforcement Bureau
ELIZABETH YOCKUS MUMAW, FCC,
Enforcement Bureau
MARY GOSSE, Administrative Officer, FCC
JEFFREY M. ZIMMERMAN, Time Warner Cable
CHRISTINA PAUZE, Time Warner Cable
CHARLES HERRING, President and Co-Founder,
WealthTV
KIM DIXON, Correspondent, Reuters
CAMERON MCALPINE

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P R O C E E D I N G S

(2:12:06 p.m.)

JUDGE SIPPEL: Just to let you all know who I am, I'm Richard Sippel. I'm the Chief Administrative Law Judge. I think it was self-explanatory in my order the other day as to what has transpired. After 40 some odd years, Judge Steinberg, my colleague, is going to be leaving the Commission in early January, and in good faith I assigned him the case to begin with, initially, on the hope, I'm not going to say on the expectation, but on a, what I consider to be, and he agreed with me, a reasonable hope that he might be able to hear this case before he left in light of the way it was set up in the Hearing Designation Order. It didn't work.

Judge Steinberg thought this through very carefully, and you all know how he came out on that. I'm talking specifically about the 60 days. So you've got a new one to deal with, I guess, if I can put it that way.

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1 I'm going to do my best to move this case
2 along, but on the other hand, I don't want to
3 feel like I'm being pushed in a corner on
4 anything. And there's obviously a lot --
5 there's a lot at stake here. There are many
6 parties, and there are very many lawyers, so
7 this is going to be a challenge.

8 I'm not going to ask for names at
9 this point. I guess I'm concerned about the
10 time. Maybe I had better do that. Why don't
11 I start from the right side of the room. I
12 just ask lead counsel to just identify
13 themselves, please, for me.

14 MR. SOLOMON: I'm David Solomon,
15 representing Comcast.

16 JUDGE SIPPEL: Mr. Solomon. And?

17 MR. COHEN: Jay Cohen for Time
18 Warner Cable.

19 JUDGE SIPPEL: Okay. And?

20 MR. BECKNER: Bruce Beckner for
21 Bright House Networks.

22 JUDGE SIPPEL: You're with Bright

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1 House?

2 MR. BECKNER: Yes, sir.

3 JUDGE SIPPEL: Okay. Next?

4 MR. MILLS: David Mills for Cox
5 Communications.

6 JUDGE SIPPEL: Okay. And?

7 MS. WALLMAN: Kathy Wallman for
8 Herring Broadcasting, d/b/a WealthTV.

9 JUDGE SIPPEL: Okay.

10 MR. FREDERICK: David Frederick
11 for TCR d/b/a as MASN.

12 JUDGE SIPPEL: Okay. Thank you.

13 MR. LEVY: Gregg Levy, NFL
14 Enterprises.

15 JUDGE SIPPEL: Sir?

16 MR. LEVY: Gregg Levy, and with me
17 today is John Blake.

18 JUDGE SIPPEL: And you're with the
19 NFL Enterprises. Is that right?

20 MR. LEVY: Correct.

21 JUDGE SIPPEL: Okay. And?

22 MR. SCHONMAN: I'm Gary Schonman

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1 on behalf of the Chief Enforcement Bureau, and
2 with me is the Chief of the Enforcement
3 Bureau.

4 JUDGE SIPPEL: Okay.

5 MR. SCHONMAN: Kris Monteith.

6 JUDGE SIPPEL: Okay. Well, good
7 afternoon, everyone. I'm pleased to meet you.
8 The main reason I'm here today was, except to
9 try to explain what transpired, is to try and
10 assess the dates. And I think that would be
11 a good place to start.

12 There is a specific provision now
13 in that order that in my absence Judge
14 Steinberg will be controlling the management
15 of this case. So any procedural questions,
16 anything that the attorneys feel they can't
17 work out for themselves. I'm going to be out
18 of the country visiting my grandsons from 19
19 December, I'll be back in on 5 January. That
20 was arranged for about nine months ago. So
21 it's going to be -- well, in any event, that
22 lets you know exactly what the lay of the land

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1 is.

2 And having said that, why don't we
3 start with -- I understand what is -- there
4 have been some motions filed with respect to
5 withdrawing the Hearing Designation Order, and
6 being sure that the Commission is going to
7 give 30 days to file exceptions, but that
8 really doesn't affect us here today.

9 Before we dive into it, does
10 anybody else have anything more that they want
11 to add or say to this? Okay. Then the first
12 date that I'm interested in, and we can move
13 back from that, is when are you going to --
14 how long will it take you to complete
15 discovery? And by discovery, I mean
16 everything that's in the rules with the
17 exception of interrogatories. The only thing
18 I want that used for is to get identification
19 of witnesses and documents, if necessary.

20 Experts are going to be deposed
21 under Rule 26 of the Federal Rules of Civil
22 Procedure. I'm sure you all are very familiar

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1 with that process. And I just want to be kept
2 apprized as to what's going on. Hopefully, I
3 won't have to rule on any questions in
4 depositions. So let's start with that first
5 date.

6 MR. LEVY: Your Honor, if I may.
7 Gregg Levy on behalf of NFL Enterprises.

8 JUDGE SIPPEL: Yes, sir, Mr. Levy.

9 MR. LEVY: We are obviously intent
10 on trying to move this as quickly as we can.
11 And towards that end, we had suggested to your
12 predecessor our inclination to submit our
13 affirmative testimony, if it was all right
14 with him, in the form of written statements,
15 with the expectation that the Defendants would
16 do the same, and that there would be
17 opportunity for cross examination.

18 JUDGE SIPPEL: Those would be
19 sworn statements. Right?

20 MR. LEVY: Sworn statements. In
21 fact, there were declarations already
22 submitted with the complaint during the

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1 complaint process. And, frankly, what we have
2 in mind is moving forward with those
3 declarations, perhaps some supplementation to
4 deal with the issue of remedy, because remedy
5 was not addressed there. And, as a result,
6 from our perspective, at least, the need for
7 discovery is very modest. The Defendant in
8 the proceeding will have a copy of the written
9 statement available for him in sworn form so
10 that they can conduct cross examination.

11 JUDGE SIPPEL: I'm familiar with
12 the procedure.

13 MR. LEVY: And we're prepared to
14 move forward very expeditiously in that
15 respect.

16 JUDGE SIPPEL: Well, is everybody
17 else prepared? Is everybody else willing to
18 do that?

19 MS. WALLMAN: Your Honor, WealthTV

20 -

21 JUDGE SIPPEL: Wait just a second.

22 Ma'am?

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1 MS. WALLMAN: WealthTV concurs
2 with that.

3 JUDGE SIPPEL: You concur with
4 that. Is anybody opposed to it?

5 MR. FREDERICK: TCR concurs, as
6 well.

7 JUDGE SIPPEL: Concurs. Who's
8 opposed?

9 MR. TOLLIN: Skipping discovery?

10 JUDGE SIPPEL: Oh, no, we haven't
11 gotten to that question yet. He's just
12 talking about at the hearing itself, using
13 sworn written testimony cross examination. No
14 direct testimony.

15 MR. COHEN: Your Honor?

16 JUDGE SIPPEL: Yes, sir.

17 MR. COHEN: Jay Cohen for Time
18 Warner.

19 JUDGE SIPPEL: Yes, sir.

20 MR. COHEN: At least in our case,
21 the Wealth case from Time Warner's
22 perspective, it is very much credibility-

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1 based. I don't think credibility
2 determinations should be made solely on the
3 basis of cross examination. I think the
4 direct testimony aids the Court in determining
5 credibility. If Wealth wants to put in
6 written directs, I guess they can do that if
7 they want, but we would prefer to have our
8 witnesses testify live on direct.

9 JUDGE SIPPEL: On direct.

10 MR. COHEN: Yes, sir.

11 MR. SOLOMON: We would agree with
12 that, Your Honor, because as Judge Steinberg
13 pointed out, credibility is an issue.

14 JUDGE SIPPEL: Yes, that's true.
15 That's usually fleshed out on cross
16 examination in my experience.

17 MR. SOLOMON: Part of the issue is
18 that the witnesses have the opportunity to get
19 their story out, and you're in a position to
20 understand that as well when determining
21 credibility.

22 JUDGE SIPPEL: Oh, if I don't

1 understand, I'm going to ask a question. I'm
2 not worried about -- don't worry about that.
3 But I understand what you're asking for.

4 MR. FREDERICK: Your Honor, if I
5 may.

6 JUDGE SIPPEL: Yes.

7 MR. FREDERICK: For TCR, if you
8 allocate an equal amount of time to both
9 sides, if the Defendants want to use their
10 time for direct testimony, we have no
11 objection to that, just so long as both sides
12 have an equal number of hours for putting on
13 their case.

14 JUDGE SIPPEL: You're shaking your
15 head.

16 MR. COHEN: Well, it turns out to
17 be unequal allocation if one side is
18 testifying live and one side is using time for
19 cross. I'm happy to talk about some
20 allocation of time, but I don't think the
21 allocation of time necessarily remedies the
22 problem, from our perspective. I mean, we

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1 think it's quite important to tell this story,
2 for having the hearing in an oral way, not
3 through papers.

4 MR. FREDERICK: Your Honor, Time
5 Warner is not a defendant in our case, and if
6 a separate situation needs to arise for the
7 Time Warner case we have nothing to say about
8 that. But with respect to our case for time
9 for Comcast, if there's to be an equal
10 allocation of time, and Comcast wants to use
11 its time for direct testimony, we have no
12 objection to that, just so long as there's no
13 expansion of time beyond what would be a
14 reasonable amount of time for the presentation
15 of the case.

16 MR. SOLOMON: Well, Your Honor,
17 taking away time from our cross examination
18 isn't making it equal. Ultimately, a decision
19 can be made how to proceed, but our view is in
20 that case, as well, there's going to be issues
21 about witnesses and their recollection of
22 various matters. And it's appropriate in that

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1 context, we think, to be able to have our
2 witnesses explain their story on direct.

3 JUDGE SIPPEL: Well, I'm not going
4 to order that. What does the Bureau think
5 about this?

6 MR. SCHONMAN: Your Honor, the
7 Bureau has an interest in seeing this case
8 move forward expeditiously, and from my
9 experience having direct written testimony
10 shortens the trial, because it allows for
11 effective, more effective cross examination at
12 which time the parties will be able to flesh
13 out and get a reading on the demeanor of the
14 witness. I don't believe you need live direct
15 testimony to accomplish that.

16 JUDGE SIPPEL: Okay. That's your
17 view. Yes, sir?

18 MR. BECKNER: Judge Sippel, you
19 may recall the Liberty Cable case we did some
20 years ago.

21 JUDGE SIPPEL: We both looked
22 quite differently in those days.

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1 (Laughter.)

2 MR. BECKNER: That's right. As I
3 recall, your daughter was getting married when
4 we got that case.

5 JUDGE SIPPEL: She's getting
6 married again in February.

7 MR. BECKNER: But the issue came
8 up in that proceeding as to whether or not we
9 would use pre-filed direct, or whether we'd
10 have live direct. And my recollection is the
11 resolution was that we would use live direct.
12 And one of the things about it, I mean let's
13 be honest here, pre-filed direct is testimony
14 written by lawyers, and suitably massaged to
15 be as favorable as possible to the case.
16 Direct testimony by witnesses is their
17 testimony, which is, I think the right word to
18 use is unvarnished. And I think there's a
19 value in that, apart from the question of
20 cross examination and so on.

21 JUDGE SIPPEL: All right. I think
22 you both have good arguments on this. I think

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1 what I'm going to do is reserve on it. If I
2 can just get the date set. My concern is
3 time, although, as I said, I'm not going to
4 just kick the can down the road to meet a
5 schedule. I don't want to put lawyers on a
6 clock, or witnesses on a clock because that
7 doesn't help me. Yes, sir?

8 MR. COHEN: Your Honor, if I could
9 just follow on something Mr. Frederick said.
10 It's true that we're not in MASN's case, and
11 perhaps it would make some sense at the outset
12 to talk about whether this is one case, three
13 cases, or six cases. And I think at least for
14 those of us in the Wealth case, the four of
15 us, we're prepared to for lots of purposes
16 talk about a schedule for the Wealth cases as
17 one proceeding. I don't really have anything
18 to say about the NFL case, or about the MASN
19 case. And I wonder if this shouldn't actually
20 be a three-part discussion, rather than one
21 discussion, because it is an unyieldy and
22 opinionated group, and it's true. It really

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1 doesn't make a difference to me what MASN and
2 Comcast work out in their case, or what the
3 NFL and Comcast work out in their's. And we
4 would cooperate with the other defendants in
5 the Wealth case, but it doesn't seem to me
6 necessarily the best way to approach this,
7 with respect, is to do a schedule for all
8 three cases simultaneously.

9 JUDGE SIPPEL: Well, I agree with
10 that, but my main concern was getting this
11 case started with discovery and finding out
12 what I have to get to. I'm figuring -- I'm
13 thinking that you all have figured that out
14 yourselves. I can see, for example, if you
15 have no interest in NFL versus Comcast, when
16 that testimony is coming in, there's no need
17 for you to be in the courtroom. You can go,
18 whatever you want to do. And it's true of
19 everybody. I just want to get the doggoned
20 case on the record, and my concern is that
21 direct examination is tough to do. You have
22 to be good to do direct testimony, because

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1 there's going to be objections on hearsay,
2 leading questions, and you know the routine
3 I'm talking about.

4 MR. COHEN: Yes, sir.

5 JUDGE SIPPEL: That can become
6 rather tedious. And for what purpose, you
7 know, for what purpose? It's hard -- I
8 understand what the nature of written
9 testimony is. I mean, I'm not going to get
10 bulldozed by that. On the other hand, it's
11 the cross examination that usually brings it
12 out. And on the other other hand, I don't
13 want to undercut how counsel wants to present
14 its case. So as long as there's no
15 unreasonable -- we're moving along, I'm not
16 going to have any problem with how you want to
17 present your case.

18 MR. COHEN: Your Honor, I meant
19 even in terms of discovery. I don't know
20 whether the discovery issues in the other
21 cases have the same scope, or the same issues
22 as in our case.

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1 MR. LEVY: Your Honor, one of the
2 advantages of submitting the case through
3 written direct testimony is it basically
4 obviates the need for discovery. Judge
5 Steinberg in his order issued last week said
6 that from his standpoint, in order to expedite
7 the cross examination of the witnesses and
8 avoid surprise, some limited discovery should
9 be undertaken. But if the cross examining
10 lawyer knows the direct testimony when he
11 walks in the room, he may have had it for a
12 week or two before he walks in the room,
13 there's no potential for surprise. And the
14 need for discovery is obviated. And that's
15 one of the reasons why we think that written
16 testimony is the way to go, and part of the
17 reason why we believe that we can move forward
18 promptly towards a hearing once we have dates
19 established for exchanging written testimony
20 or filing written testimony.

21 JUDGE SIPPEL: Well, good point.

22 MR. TOSCANO: Your Honor, David

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